

February 24, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Arlie Bryan Siebert

Date of Filing: December 20, 2005
January 9, 2006

Case Number: TFA-0137
TFA-0142

This Decision concerns two Appeals filed by Arlie Bryan Siebert from determinations issued to him by the Department of Energy's National Nuclear Safety Administration (NNSA) (TFA-0137; TFA-0142) and the Office of Security and Safety Performance Assurance (Security) (TFA-0142). These determinations were issued in response to a request for information that Mr. Siebert submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require that the documents that NNSA withheld in whole or in part be released to Mr. Siebert and that Security perform a new search for responsive documents.

I. Background

In his FOIA request, Mr. Siebert requested information concerning "the name, rank, job description, promotions, promoters, punishment, level of security clearance, and retention or termination of security clearance" of DOE employees who received bogus academic degrees. Letter from Abel Lopez, DOE FOIA and Privacy Act Group, to Mr. Siebert (November 21, 2005).

In its determination, NNSA stated that it identified three NNSA employees "as receiving degrees of interest relevant to [Mr. Siebert's] inquiry," i.e., degrees from unaccredited institutions, but that it was withholding the information under Exemption 6 of the FOIA. Letter from NNSA to Mr. Siebert (November 15, 2005) (NNSA Determination Letter). NNSA stated that the relevant files were personnel files in which the individuals had a reasonable expectation of privacy. NNSA further stated that even with personal identifiers such as names, addresses and phone numbers deleted from the files, sufficient information remained so that the identities of the

individuals was ascertainable. *Id.* NNSA maintained that the public interest in disclosure did not outweigh the privacy interests of the individuals. *Id.*

The other DOE office, Security, stated that it performed a search of its files and did not locate any responsive documents. Security stated that it did not maintain records of the identities of DOE employees who may have received bogus academic degrees. Memorandum from Stephanie Grimes, Security, to Diane DeMoura, OHA (February 2, 2005).

In his Appeals, Mr. Siebert made several arguments contesting the withholding of the identities of DOE employees who received bogus academic degrees. Mr. Siebert's primary argument, made in both appeals, is that the public has an interest in knowing the identities of the employees with bogus degrees. Mr. Siebert contends that the public's interest in disclosure outweighs "the privacy of those who lied about their academic credentials and who are in sensitive positions involving national security." Letter from Mr. Siebert to OHA (December 1, 2005) (First Appeal Letter). Regarding Security's determination, Mr. Siebert contends that Security could obtain from another DOE office a list of the individuals with bogus degrees and could then search its records for responsive documents. Letter from Mr. Siebert to OHA (December 20, 2005) (Second Appeal Letter).¹

II. Analysis

A. The NNSA Determination

Exemption 6 of the FOIA protects from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a document may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the document may not be withheld pursuant to Exemption 6. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). Third, the agency must balance the identified privacy interests against the public interest in order to determine whether release of the document would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. *See generally Ripskis*, 746 F.2d at 3.

¹ In his second appeal letter, Mr. Siebert also disputed his categorization as an "other" requester for the purpose of assessing fees for the processing of his FOIA request and requested a fee waiver. However, we have learned that Mr. Siebert had not yet been assessed any fees in connection with this request at the time of the filing of this appeal. *See* Electronic Mail Message from Joan Ogbazghi, FOIA and Privacy Act Group, to Diane DeMoura, OHA (January 13, 2006). Accordingly, this argument is not ripe for our review.

In this case, NNSA determined that release of the withheld information would result in the invasion of personal privacy interests in that the release of the information would disclose personal information of certain individuals and potentially lead to those individuals being embarrassed, harassed, or otherwise unable to perform their duties.

Having identified a privacy interest in the withheld information, it is necessary to determine whether there is a public interest in the disclosure of the information. Information falls within the public interest if it contributes significantly to the public's understanding of the operations or activities of the government. *See Reporters Committee*, 489 U.S. at 775. Therefore, unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id.*; *see also National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

In the present case, we agree that there may be a public interest in knowing whether a DOE employee has a bogus academic degree in a case where having a degree from an accredited institution was a specific condition of employment. For example, the public may have an interest in knowing whether an employee lied about an academic degree in order to secure a position with DOE or whether public funds were used to pay for that individual's education. However, we find that there is no such public interest in this case. NNSA stated that the three individuals who had degrees from unaccredited institutions did not have to meet an educational requirement as a condition of employment; each employee was hired based on their past work experience. NNSA Determination Letter. Accordingly, the release of the personnel information in question would reveal little, if anything, to the public about the workings of the government and could subject the individuals to considerable embarrassment or harassment. Therefore, after weighing the significant privacy interests present in this case against a minimal or even non-existent public interest, we find that release of information revealing the identities and other personal information of the federal employees relevant to Mr. Siebert's request could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (1995). However, material need not be segregated and released when the exempt and nonexempt material are so "inextricably intertwined" that release of the nonexempt material would compromise the exempt material, or where nonexempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. *Lead Industries Assoc. v. OSHA*, 610 F.2d 70, 85 (2nd Cir. 1979).

In this case, the documents in question, standard personnel forms, consist mainly of exempt individual-specific information. However, in discussing this appeal with NNSA, we learned that the documents also contain some information that could be released without compromising the privacy interests identified above. Accordingly, we shall remand this matter to NNSA. On remand, NNSA must review the document and segregate and release any non-exempt

information, or issue a new determination that justifies withholding the factual portions of the document.

B. The Security Determination

In responding to a request for information filed under the FOIA, it is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). “The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003). However, the FOIA does not require an agency to create new documents in response to an FOIA request, but merely requires the agency provide documents already in its possession. *See, e.g., Quanterra Environmental Services*, 25 DOE ¶ 80,138 (1995).

In reviewing this case, we contacted Security to discuss the initial search. Security informed us that it undertook a search of its records but that “there were no indices available to determine identities of DOE employees who may have received bogus academic degrees.” Memorandum from Stephanie Grimes, Security, to Diane DeMoura, OHA (February 2, 2006). Security did not, nor does the FOIA require it to, obtain information from another DOE office in order to create a new record which would be responsive to Mr. Siebert’s request. Accordingly, we find that Security performed a search that was reasonably calculated to reveal responsive records and was, therefore, adequate.

III. Conclusion

For the reasons stated above, we have determined that NNSA properly applied Exemption 6 of the FOIA in withholding information from Mr. Siebert. However, the withheld documents may contain some factual information which is reasonably segregable from the exempt portions of the documents. We have also determined that Security conducted an adequate search for responsive records. Therefore, Mr. Siebert’s appeals should be granted in part and denied in part.

This Decision and Order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the Decision and Order shall be implemented by each affected NNSA element, official, or employee, and by each affected contractor.

It Is Therefore Ordered That:

(1) The Appeals filed on December 20, 2005 (TFA-0137) and January 9, 2006 (TFA-0142), by Arlie Bryan Siebert, are hereby granted as set forth in paragraph (2) below, and are in all other respects denied.

(2) This matter is hereby remanded to the National Nuclear Security Administration for further proceedings in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 24, 2006